Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

October Term, 2000

M. MAUREEN POLSBY, M.D., PETITIONER

v.

BARBARA A. MIKULSKI, STENY H. HOYER, LYNNE A. BATTAGLIA, HOWARD S. CHASANOW, MARYLAND DEMOCRATIC PARTY, JANET RENO, in her official capacity as Attorney General of the United States, UNITED STATES, RESPONDENTS

Petition for a Writ of *Certiorari* to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR A WRIT OF *CERTIORARI*

M. MAUREEN POLSBY, M.D.
Petitioner, *pro se*
3416 Livingston St., NW
Washington, DC 20015
202-363-6331

1PP

QUESTION PRESENTED

Whether an appeals court panel, sua sponte, may selectively dismiss an appeal and refuse to "excuse an untimely notice of appeal where the appellant could have filed a timely notice but was misled to delay filing by a court order"[1] [erroneously granting a consent motion for an extension of time to file a motion for reconsideration], and whether the panel's dismissal of this particular appeal, even in the case of a pro se appellant, creates the appearance that the panel's goal was to also circumvent an intervening decision by this Court which struck down the D.C. Circuit's "heightened pleading standard" for complaints against public officials[2] and which required the panel to reverse the district court's dismissal of a substantive complaint against a U.S. senator and other powerful defendants, and whether such improper action on the part of the panel calls for an exercise of this Court's supervisory powers.

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[1]Moore v. South Carolina Labor Board, et al., 100 F.3d 162 (D.C. Cir. 1996).

[2]Crawford-El v. Britton, 523 U.S. 574 (1998).

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An appeals court panel may not selectively refuse to "excuse an untimely notice of appeal where the appellant could have filed a timely notice but was misled to delay filing by a court order" [erroneously granting a consent motion for an extension of time to file a motion for reconsideration]. The panel's dismissal of this particular appeal creates the appearance that the panel's goal was to circumvent an intervening Supreme Court decision which struck down the D.C. Circuit's "heightened pleading standard" for complaints against public officials and which would have required the panel to reverse the district court's dismissal of a substantive complaint against a U.S. senator and other powerful defendants. The panel's dismissal of the appeal calls for an exercise of this Court's supervisory powers.

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No.

M. MAUREEN POLSBY, M.D., PETITIONER

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Petition for a Writ of *Certiorari* to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR A WRIT OF *CERTIORARI*

M. Maureen Polsby, M.D., respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The court of appeals' dismissal of the appeal (App., *infra*, 2a) is unreported. The appellant's petition for rehearing was denied on May 1, 2000 (App., *infra*, 1a). The district court's opinion dismissing defendants Chasanow and Maryland Democratic Party is unreported. The district court's final judgment in favor of the remaining defendants on the remaining claims is unreported and was entered on July 12, 1999. On August 26, 1999, the district judge denied Dr. Polsby's motion for reconsideration (App., *infra*, 4a) and issued a memorandum opinion giving his rationale for his denial of the motion for reconsideration.

JURISDICTION

The court of appeals dismissed the appeal on February 17, 2000. (App., *infra*,1a). The court of appeals denied Dr. Polsby's petition for rehearing and suggestion for rehearing *en banc* on May 1, 2000 (App., *infra*,2a). This Court has jurisdiction under 28 U.S.C. § 1254 (1).

STATEMENT

A. Introduction

The appeals court panel selectively and improperly dismissed the appeal in this case, sua sponte, due to what

appellant hopes is a misunderstanding regarding the timeliness of her motion for reconsideration in the lower court.[1] Dr. Polsby acted in reliance on an order of the district judge granting her an extension of time. Therefore, the **unique circumstances exception** to the Federal Rules of Civil Procedure applies. The panel's dismissal of the appeal is in conflict with decisions of the U.S. Supreme Court as well as the case law of its own circuit. See Wolfsohn v. Hankin, 376 U.S. 203, 11 L. Ed. 2d 636, 84 S. Ct. 699 (1964); Thompson v. INS, 375 U.S. 384, 11 L. Ed. 2d 404, 84 S. Ct. 397 (1964); Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc., 371 U.S. 215, 9 L. Ed. 2d 261, 83 S. Ct. 283 (1962). See also Center for Nuclear Responsibility v. NRC, 251 U.S. App. D.C. 82, 781 F.2d 935, 941 & n.11 (D.C. Cir. 1986); Aviation Enterprises, Inc. v. Orr, 230 U.S. App. D.C. 285, 716 F.2d 1403, 1406 n. 25 (D.C. Cir 1983); Webb v. Dep't of Health & Human Services, 225 U.S. App. D.C. 19. 696 F.2d 101, 106 (D.C. Cir 1982); Moore v. South Carolina Labor Board, et al., 100 F.3d 162 (D.C. Cir. 1996).

B. Factual Background and Argument

The judgment in the lower court was entered on July 12, 1999. Judge Kennedy granted plaintiff's consent motion to extend the time for filing her motion for reconsideration to August 9, 1999. Dr. Polsby then obtained consent from opposing counsel for two days' additional time, to August 11, 1999. Judge Kennedy did not deny the second motion for an extension and proceeded to rule on Dr. Polsby's motion for reconsideration. On August 26, 1999, the district judge denied Dr. Polsby's motion for reconsideration and issued a

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[1] as opposed to an intentional denial of due process.

memorandum opinion giving his rationale for his denial of the motion for reconsideration. These acts of the district judge, in addition to the consent of the U.S. Attorney, actively led Dr. Polsby to believe that the time for filing her notice of appeal was being tolled. Dr. Polsby timely filed her notice of appeal within 60 days of the denial of her motion for reconsideration.

At the time Judge Kennedy granted the extension of time, and even at the time he ruled on the motion for reconsideration, Dr. Polsby was still well within the sixty-day limitations period for filing a notice of appeal. Had Judge Kennedy not erroneously granted the extension, but had properly denied it instead, and had he not issued a ruling on her motion for reconsideration, Dr. Polsby would not have been falsely led to believe that the sixty-day limitations period for noticing her appeal was being tolled. She would have still been within sixty days of the prior judgment in the case. She would have then directly filed her notice of appeal within sixty days of the original judgment.

It has been well settled by this Court, as well as by the case law of the D.C. Circuit itself, that if a litigant has acted in reliance on erroneous orders by the district judge, then the appeal must be allowed to proceed under the **unique circumstances exception** to the Federal Rules. "...appellate courts will excuse an untimely notice of appeal where the appellant could have filed a timely notice but was misled to delay filing by a court order..." Moore, 163.

In addition, the D.C. Circuit allowed full briefing at the appeals court level to take place, and further, the appellees never raised a timeliness issue. Appellees, in fact, consented to two extensions of time. The U.S. government's own attorneys did not understand the fine print in the Federal Rules any better than did the district judge, much less a pro se plaintiff like Dr. Polsby.

Extensive case law on the unique circumstances doctrine and also extensive case law on the leeway which must be given to pro se litigants, mandates an exercise of this Court's supervisory powers. Dr. Polsby asks this Court to vacate the dismissal of the appeal and require the appeals court to make a ruling on the merits of the appeal.

Furthermore, motions for summary reversal and summary affirmance were **already fully briefed**. The parties have been awaiting the appeals court ruling on the merits of the arguments made therein.

It is the duty of the circuit courts to correct errors made at the district court level. If a district judge (in this case a recent appointee) erroneously granted a motion for an extension of time due to lack of awareness of the Federal Rules, then it becomes more likely that other errors were made below. It is the obligation of the D.C. Circuit to correct those errors, especially if they are serious errors on substantive points of law which appear in a written opinion.

Dr. Polsby is a pro se plaintiff who had leave of court as well as the consent of the defendants to file her motion for reconsideration in excess of ten days after the entry of judgment. The defendants can in no way be said to be prejudiced by Dr. Polsby's late filing of her motion for reconsideration because they consented to it. Neither Dr. Polsby, nor the district judge, nor the U.S. Attorney was aware that the time for filing a motion for reconsideration may not be extended. It is well settled that under these circumstances, a pro se litigant cannot be held to a level of knowledge of the Federal Rules greater than that of a district court judge and, in this case, also of the U.S. Attorney. It is the condition of being actively misled by an actual district court order which created the unique circumstances doctrine. That doctrine applies to this case and mandates revocation of the dismissal of Dr. Polsby's appeal. To not reverse the

dismissal of this appeal would violate the most basic rules of fairness.

It should be mentioned that in the case of a pro se litigant, for the courts to adhere to a strict ten-day time limit for the filing of a motion for reconsideration seems unfair in and of itself, as well. Dr. Polsby is not a member of a law firm, and she lives alone. She earns her living as a physician and works six days a week. District court judges are known to take as much as a year or two to rule on dispositive motions. A busy pro se litigant like Dr. Polsby has no way of predicting when a district court judge will issue a final judgment. Judges know what it is like to have problems getting their work done. Dr. Polsby, who is a physician, also has little time in which to get her large amount of daily work done. To expect her to be immediately available within ten days and without notice, to devote her time to a motion for reconsideration, without the possibility for an extension of time, is fundamentally unfair. Judge Kennedy's opinion was issued in the middle of the summer when a pro se litigant might be on vacation or out of town for whatever reason at any time of the year. Dr. Polsby was not out of town, but such exigencies in the cases of individuals who represent themselves pro se demonstrate that it is unfair to hold pro se litigants to strict time limitations without any possibility for extensions of time. Law firms and the Justice Department have people who are always there to at least open the mail and who can respond to court rulings on little notice. To hold pro se litigants who are without a support system to the same inflexible ten-day time period as others, effectively denies such litigants the same opportunity for reconsideration as the government or someone who is represented by counsel, and therefore denies pro se litigants due process of law and equal protection under the law.

Additionally, the appeals court had permitted extensive briefing to take place. If it is the appeals court's position that Dr. Polsby's motion for reconsideration was not timely filed, it does not seem right for the appeals court not to have made that determination earlier. The appeal went far beyond mere acceptance and processing of the notice of appeal. Motions for summary reversal and affirmance were already fully briefed. The fact that the district judge, in addition to granting an extension of time, also made a ruling on Dr. Polsby's motion for reconsideration, and that the appeals court then allowed the appeal to proceed to full briefing of dispositive motions, should preclude a belated sua sponte determination that the motion for reconsideration in the lower court was not timely filed.

In this particular case, the improper dismissal of the appeal creates the appearance that factors other than a fair application of the law may have played a role. The defendants in the complaint include a United States senator and a United States congressman. The complaint includes allegations of manipulation of the judicial system in Maryland, including judge switching at the behest of these politicians. The appeal briefs include allegations that the defendants did the same thing again in U.S District Court for the District of Columbia. The defendants in the complaint are powerful allies of the Clinton administration. The complaint was originally randomly assigned to a Reagan appointee but was then switched to Judge Henry H. Kennedy, a Clinton appointee. An examination of the district court record in this case indicates that opposing counsel were aware of the switch before it occurred, and indicates that they were stalling for time until the switch could be effected. Wilma Lewis, a Clinton appointee and counsel for the defendants, Chief Judge Norma Holloway Johnson, who has the power to re-assign cases, and Judge Kennedy are all

African-Americans from the District of Columbia who are close associates and who are the political allies of the defendants and of the Clinton administration. Judge Kennedy dismissed the complaint for invalid reasons. Now, the appeal has been dismissed for invalid reasons.

Dr. Polsby asks the Court to exercise its supervisory powers and reverse the dismissal of her appeal and to require the circuit court to allow her appeal to proceed on its merits without any further funny business. Not to do so would be a manifest injustice to a pro se appellant whose complaint in district court was unfairly dismissed. The district judge made errors below which are more serious than the misunderstanding of the Federal Rules on the part of all the parties and the district judge. This Court should require the appeals court to examine and correct those errors. Dr. Polsby should not be unfairly denied her right to an appeal.

REASONS FOR GRANTING THE PETITION

An appeals court panel may not selectively refuse to "excuse an untimely notice of appeal where the appellant could have filed a timely notice but was misled to delay filing by a court order" [which erroneously granted a consent motion for an extension of time to file a motion for reconsideration] in the case of a pro se appellant. Moreover, the panel's dismissal of this particular appeal creates the appearance that the panel's goal was to circumvent an intervening decision by this Court which struck down the D.C. Circuit's "heightened pleading standard" for complaints against public officials. Proper consideration of the appeal on the merits would have required the panel to reverse the district court's dismissal of a substantive complaint against a U.S. senator and other powerful defendants. The improper dismissal

of the appeal by the appeals court demands that this Court exercise its supervisory powers.

CONCLUSION

The questions raised in this petition are extremely important. They concern the fundamental right to an appeal of a district court decision. The issues also concern every citizen's constitutional right to due process of law and equal protection under the law. The circuit court has deprived petitioner of those rights. The Court must protect the right to an appeal and the rights of every citizen to receive equal and fair treatment in the justice system. Therefore, this petition for a writ of *certiorari* should be granted.

Respectfully submitted.

M. MAUREEN POLSBY, M.D.

Petitioner, *pro se*
3416 Livingston St., NW
Washington, DC 20015
202-363-6331

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 99-5358 **September Term, 1999**
97cv00611
Filed On: May 1 2000

M. Maureen Polsby, M.D.,
Appellant
v.
Barbara A. Mikulski, et al.,
Appellees

BEFORE: Ginsburg, Sentelle and Garland, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing filed March 31, 2000, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: (signed)
Robert A. Bonner
Deputy Clerk

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 99-5358

September Term, 1999
97cv00611
Filed On: May 1 2000

M. Maureen Polsby, M.D.,
Appellant
v.
Barbara A. Mikulski, et al.,
Appellees

BEFORE: Ginsburg, Sentelle and Garland, Circuit Judges

ORDER

Upon consideration of the motion for summary affirmance, and the opposition thereto; the motion for summary reversal, the opposition thereto, and the reply,it is

ORDERED that the motion for summary affirmance of the district court's order filed August 27, 1999, be granted as to all appellees. The merits of the parties' positions are so clear as to warrant summary action. See *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam); *Walker v. Washington*, 627 F.2d 541, 545 (D.C. Cir.) (per curiam), *cert. denied*, 449 U.S. 994 (1980). Appellant filed her notice of appeal on October 22, 1999, well beyond the 60-day appeal period for noting an appeal from the July 12, 1999, order. Although the time for noting an appeal is tolled by the timely filing of a Rule 59(e) motion for reconsideration, the motion here was not filed within the time specified by the rule. See Fed. R. Civ. P 59(e) (motion shall be filed no later than 10 days after entry of judgment). Accordingly, the only order properly before this Court is the

August 27 order denying reconsideration and leave to file the fourth amended complaint. This court reviews the denial of reconsideration for abuse of discretion, see *Twelve John Does v. District of Columbia*, 841 F.2d 1133, 1138 (D.C. Cir. 1996). The district court did not abuse its discretion in denying reconsideration or leave to file the fourth amended complaint. It is

FURTHER ORDERED that the motion for summary reversal be denied.

The Clerk is directed to withold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. Civ. P. 41(b); D.C. Cir. Rule 41.

Per Curiam
(initialed)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

M. Maureen Polsby, M.D.,
Plaintiff
v. **Civil Action 97cv00611 (HHK)**

Barbara A. Mikulski, et al.,
Defendants

Filed August 26 1999

ORDER

Before the court are the motions of plaintiff for leave to file a fourth amended complaint (document #98) and for reconsideration of this court's order dismissing her complaint (document #105). Upon consideration of the motions, the oppositions thereto, and the record of this case, the court concludes that the motions should be denied.

Accordingly, it is this 26th day of August, 1999, hereby

ORDERED that the motion of plaintiff for leave to file a fourth amended complaint (document #98) is denied; and it is further

ORDERED that the motion of plaintiff for reconsideration of this court's order dismissing her complaint (document #105) is denied.

(signed)
Henry H. Kennedy, Jr.
United States District Judge